FOR ARGUMENT

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# In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 75-1775.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

*v.*

JACK B. WESTCOTT,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

## Brief for the Respondent.

GEORGE M. VETTER, JR.,
HINCKLEY, ALLEN, SALISBURY & PARSONS,
2200 Industrial Bank Building,
Providence, Rhode Island 02903.
(401) 274-2000

Of Counsel:
NANCY HALL MCMILLEN,
HINCKLEY, ALLEN, SALISBURY & PARSONS,
2200 Industrial Bank Building,
Providence, Rhode Island 02903.

*Attorneys for the Respondent.*

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

## Table of Contents.


Opinions below 1

Jurisdiction 2

Statute involved 2

Question presented 3

Statement of the case 3

Summary of argument 5

Argument 7

I. Commercial fishing in the marginal sea is a privilege and immunity of citizenship so that under Toomer v. Witsell the Massachusetts statute is unconstitutional because it discriminates against citizens of other states solely on the ground that they are citizens of other states 7

II. Massachusetts' attacks on Toomer v. Witsell are not well taken 13

III. To adopt Massachusetts' position would burden the nation with problems heretofore solved 18

Conclusion 19

Addendum 21


## Table of Authorities Cited.

CASES.


Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973) 17

Brown v. Anderson, 202 F. Supp. 95 (D. Alas. 1962) 12

Corsa v. Tawes, 149 F. Supp. 771 (D. Md. 1957), aff'd, 355 U.S. 37 (1957) 17

Dobard v. State, 149 Tex. 332 (1950) 13
Edwards v. Leaver, 102 F. Supp. 698 (D. R.I. 1952) 12, 13
Geer v. Connecticut, 161 U.S. 519 (1896) 8
Glenovich v. Noerenberg, 346 F. Supp. 1286 (D. Alas. 1972), aff'd, 409 U.S. 1070 (1972) 17
Gospodonovich v. Clements, 108 F. Supp. 234 (E.D. La. 1951), appeal dismissed, 344 U.S. 911 (1953) 12
Graham v. Richardson, 403 U.S. 365 (1971) 6, 15, 18
Hunt v. United States, 278 U.S. 96 (1928) 15
Kleppe v. New Mexico, 406 F. Supp. 1237 (D. N.M. 1975) 13
Kleppe v. New Mexico, 96 S. Ct. 2285 (1976) 6, 13, 14, 15
Manchester v. Massachusetts, 139 U.S. 240 (1891) 11, 16
McCready v. Virginia, 94 U.S. 391 (1876) 6, 8, 10, 11, 12, 15, 18
McKee v. Gratz, 260 U.S. 127 (1922) 16
Missouri v. Holland, 252 U.S. 416 (1920) 11, 15, 16
Mullaney v. Anderson, 342 U.S. 415 (1952) 13
Organized Village of Kake v. Egan, 174 F. Supp. 500 (D. Alas. 1959), aff'd, 362 P. 2d 901 (Sup. Ct. Alas. 1961), aff'd, 369 U.S. 60 (1962) 17
Paul v. Virginia, 8 Wall. 168 (1868) 9
Russo v. Reed, 93 F. Supp. 554 (D. Me. 1950) 12
Schakel v. State, 513 P. 2d 412 (Wyo. 1973) 13
Skiriotes v. Florida, 313 U.S. 69 (1941) 16
Steed v. Dodgen, 85 F. Supp. 956 (W.D. Tex. 1949) 12
Sugarman v. Dougall, 413 U.S. 634 (1973) 15
Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) 13, 15, 18



Toomer v. Witsell, 334 U.S. 385 (1948) 5, 6, 7, 8, 9, 10, 11 et seq.
United States v. California, 332 U.S. 19 (1947) 11, 16
United States v. Louisiana, 339 U.S. 699 (1950) 16
United States v. Maine, 420 U.S. 515 (1975) 17
United States v. Texas, 339 U.S. 707 (1950) 16
Ward v. Maryland, 12 Wall. 418 (1870) 9

CONSTITUTIONAL AND STATUTORY PROVISIONS.

United States Constitution
Article II, § 2 (Treaty Clause) 15
Article IV, § 2, cl. 1 (Privileges and Immunities Clause) 3, 4, 9, 10, 11, 12, 15
Article IV, § 3, cl. 2 (Property Clause) 13
Equal Protection Clause 4, 13
Submerged Lands Act of 1953, 43 U.S.C. §§ 1301 et seq. 6, 7, 8, 16, 17
Wild Free-Roaming Horses and Burros Act, 16 U.S.C §§ 1331 et seq. 13
28 U.S.C. § 1257(3) 2
Mass. Gen. Laws c. 130, § 99 4, 5
Act of February 20, 1923, Ch. 35, 1923 Mass. Acts and Resolves 17 2, 3
Mass. Acts of 1936, c. 158 4, 5
Act of March 13, 1962, Ch. 219, 1962 Mass. Acts and Resolves 107 2

MISCELLANEOUS.

99 Cong. Rec. 2563-2564 (1953) 7, 17

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## Opinions Below.

The majority and dissenting opinions of the Supreme Judicial Court (A. 11-26) are reported at Mass. Adv. Sh. (1976) 696-716 and 344 N.E. 2d 411-419.

## Jurisdiction.

The Supreme Judicial Court entered a judgment on March 12, 1976, declaring a statute of Massachusetts unconstitutional (A. 2). The Commonwealth of Massachusetts filed a petition for a writ of certiorari on June 7, 1976. This Court granted the writ on October 4, 1976 (A. 2). The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

## Statute Involved.

The Act of February 20, 1923, Ch. 35, 1923 Mass. Acts and Resolves 17, *as amended by* the Act of March 13, 1962, Ch. 219, 1962 Mass. Acts and Resolves 107:

> "It shall be unlawful during the months of July, August and September for any person who has not been a legal resident of this commonwealth during the preceding year to use beam or otter trawls to drag for fish in that part of the waters of Vineyard Sound lying in the towns of Chilmark, Gay Head and Gosnold, and included between an imaginary line running from the extreme western point of Gay Head to the extreme western point of Nashawena Island and another imaginary line running from Cape Higgon to Tarpaulin Cove Light. Violation of this act shall be punished by a fine of not less than five hundred nor more than one thousand dollars."



## Question Presented.

Does Chapter 35 of the Massachusetts Acts of 1923 violate the privileges and immunities clause of Article IV, § 2, of the United States Constitution by making it unlawful for non-residents but not for residents of the state to drag for fish by beam or otter trawl in Vineyard Sound during July, August, and September?

## Statement of the Case.

On September 5, 1973, Jack B. Westcott was arrested by an officer of the Massachusetts Department of Natural Resources for violating Chapter 35 of the Acts of 1923, as amended (A. 4).

That statute makes it unlawful for a person who has not been a resident of Massachusetts during the preceding year to drag for fish by beam or otter trawl during July, August, and September in Vineyard Sound.

When he was arrested Westcott was dragging for fish, namely scup and fluke, by otter trawl in the SUZANNE in Vineyard Sound (A. 4-5).

The waters of Vineyard Sound are navigable waters of the United States (A. 5).

Scup and fluke are migratory fish (A. 4).

The SUZANNE was registered out of Point Judith, Rhode Island, and was owned without the Commonwealth of Massachusetts (A. 4-5).

Westcott had not been a legal resident of Massachusetts for the year preceding the date of his arrest, or for the year preceding July 1, 1973. He was then and is now a resident of Narragansett, Rhode Island (A. 5).

On September 7, 1973, the Natural Resources officer swore out a criminal complaint against Westcott charging violation of the statute. Westcott pleaded not guilty (A. 2-3).

On April 24, 1974, Westcott was tried, found guilty, and fined $500 in the District Court of Dukes County (A. 4). On April 26, 1974, he appealed to the Superior Court of Dukes County for *de novo* review (A. 4).

On May 14, 1974, Westcott's case was called for trial in the Superior Court (A. 1). He moved to dismiss the complaint on the grounds that the statute violated the privileges and immunities and equal protection clauses of the United States Constitution (A. 7-8). At the hearing on the motion, the parties submitted to the court an agreed statement of facts (A. 4-7).

The Superior Court conducted no trial and reserved decision on the motion. On May 23, 1974, it reported two questions to the Appeals Court: Whether the statute violated the privileges and immunities clause by imposing differential treatment between fishermen who are residents of Massachusetts and those who are not? Whether the criteria for legal residence in Massachusetts during the preceding year as provided in the statute violated the equal protection clause? (A. 9-10.)

On May 15, 1975, the Supreme Judicial Court granted direct appellate review (A. 2). On March 12, 1976, it held, with one judge dissenting, that the statute violated the privileges and immunities clause, and remanded the case to the Superior Court with instructions to allow Westcott's motion to dismiss. The court did not pass on Westcott's equal protection claim (A. 11-26).

The parties stipulated to certain further facts in the agreed statement of facts.

They agreed that the waters covered by two other Massachusetts statutes, Chapter 158 of the Acts of 1936, as amended, and Section 99 of Chapter 130 of the General Laws, as



amended, were also navigable waters of the United States (A. 5).

Chapter 158 prohibits a nonresident of Massachusetts from taking fish by otter trawl in Vineyard and Nantucket Sounds at any time (A. 6-7).

Section 99 forbids any vessel owned without Massachusetts other than a common carrier from carrying fish taken in coastal waters out of Massachusetts, and provides that any person in such a vessel who takes fish for that purpose shall be fined and the catch forfeited (A. 7).

The parties also agreed that if called as a witness Westcott would testify as follows: That the waters covered by all three statutes are good areas for fishing for migratory fish such as scup and fluke by beam and otter trawl; that the freedom throughout the year to fish in and to carry his catch out of those waters and any coastal waters of Massachusetts in a vessel owned without Massachusetts and which is not a common carrier is a valuable right to him (A. 5).

## Summary of Argument.

This case is identical to *Toomer* v. *Witsell*, 334 U.S. 385 (1948). That case held that commercial fishing in the marginal sea is a privilege and immunity of citizenship. It declared a South Carolina statute excluding nonresidents from fishing for free-swimming migratory fish in the marginal sea for the sole reason that they are nonresidents to be unconstitutional. On the authority of *Toomer*, the Massachusetts statute, identical in all respects, is likewise unconstitutional.

Massachusetts contends that *Toomer* is no longer good law if it ever was. Massachusetts says that *Toomer* was a judicial sport, and that in any event it has been undermined by the

Submerged Lands Act of 1953, 43 U.S.C. §§ 1301 *et seq.* Consequently, it concludes that the antique special public interest doctrine of *McCready* v. *Virginia*, 94 U.S. 391 (1876), applies to this case: *i.e.*, that the right of a state citizen to hunt and fish rests on his collective ownership of game, not his state citizenship, and hence is not a privilege of state citizenship guaranteed to citizens of other states.

The arguments are not well taken and the contention fails.

In *Toomer*, discriminatory state statutes had led to a partitioning of the shrimp fishery off the Southern coast along state lines. This hindered optimum methods of fishing. It deprived citizens of one state from doing business in another state on a substantially equal basis with citizens of that state. The severity of the discrimination bore no reasonable relationship to the evil, real or feigned, posed by nonresidents.

The public interest doctrine of *McCready* did not apply for two reasons. The free-swimming migratory fish of *Toomer* are not susceptible of ownership, unlike stationary creatures such as the oysters of *McCready*. *Toomer* involved the marginal sea whereas *McCready* involved a tidal river. Anyway, the ownership doctrine was never anything more than a legal fiction to explain a state's control of and need to control its wildlife. There is no conflict between that control and the need to exercise that control consistent with constitutional guarantees. The police power is the modern management tool.

Many decisions have followed *Toomer*. The recent case of *Kleppe* v. *New Mexico*, 96 S. Ct. 2285 (1976), reaffirmed it in all respects. So, far from being a derelict of the law, *Toomer* is alive and vital. Furthermore, constitutional rights no longer turn on the privilege-right distinction. *Graham* v. *Richardson*, 403 U.S. 365 (1971). And there are other reasons why Massachusetts' attack on *Toomer* is not sound.



As for the Submerged Lands Act of 1953, it could only grant what the United States had. The United States did not own free-swimming migratory fish. The Act could not create such ownership since such ownership is inherently impossible. The ownership language of the Act must be construed as a legal fiction for the need of a state to control its wildlife. The legislative history bears this out. 99 Cong. Rec. 2533-2564 (1953).

Massachusetts' position is also wrong in policy. It would again lead to a feudal situation in commercial fishing in the marginal sea. It would cause concentration of the industry in states with long shorelines. It would unsettle the law in other areas by reintroducing the right-privilege distinction. It would undercut the utility of the police power as a management tool of the states' natural resources. The police power better serves as a management tool because it better harmonizes with other constitutional provisions.

At bottom, Massachusetts misconceives the issue. The issue is not the source of the power to control, but that control, whatever its source, be exercised consistent with constitutional guarantees.

## Argument.

### I. Commercial Fishing in the Marginal Sea is a Privilege and Immunity of Citizenship so that under Toomer v. Witsell the Massachusetts Statute is Unconstitutional Because it Discriminates Against Citizens of Other States Solely on the Ground that They are Citizens of Other States.

1. Massachusetts is in the same position as South Carolina was in *Toomer* v. *Witsell*, 334 U.S. 385 (1948). The facts

and statutes in both cases are identical. The arguments made to support the statutes are the same. The Court rejected those arguments in *Toomer*. That case controls unless there is something else.

Massachusetts says there is something else. It says *Toomer* is no longer good law if it ever was. It characterizes the case as out of the mainstream of the law, a judicial sport. Besides, it says, the case has been undermined by the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301 *et seq*. With *Toomer* out of the way, Massachusetts argues, the Court can return to the mainstream doctrine of special public interest articulated in *McCready* v. *Virginia*, 94 U.S. 391 (1876), which *Toomer* explicitly refused to follow, and *Geer* v. *Connecticut*, 161 U.S. 519 (1896).

The special public interest doctrine harks back to ancient law about control and possession of animals *ferae naturae*. Without tracing the modifications of the doctrine throughout the years, suffice it to say that, when it was received in this country, it was suitably modified for a free people. Massachusetts opts for the following version of the doctrine:

> The citizens of a state own the wildlife of the state, whether migratory or not, in common. The government of the state, as a sort of trustee, exercises this ownership for the benefit of all its citizens, which includes discriminating against persons lacking this beneficial interest. Thus the right of state citizens to hunt or fish within the state is a property right and not a privilege or immunity of state citizenship guaranteed by the Constitution to citizens of other states.

Massachusetts waffles as to whether this formula is or should be the law. But it is firm in another respect: it altogether avoids discussing the weighty constitutional considerations underpinning the decision in *Toomer*. A glimpse of that remarkable case obviously is in order.



2. In *Toomer* a South Carolina statute required nonresidents to pay a fee one hundred times greater than that paid by residents for a license to shrimp commercially in the three-mile maritime belt off the coast of that state.

The South Carolina fishery was part of a larger fishery extending from North Carolina to Florida. The shrimp were migratory. Shrimpers preferred to follow the shrimp from the Carolinas as they migrated south along the coast. Each of the bordering states sought for its residents the opportunity to shrimp in this optimum way. Some of the states, however, appeared more concerned with channeling to their own residents the business derived from local waters. Hence, statutes such as that of South Carolina. The restrictions on nonresident fishing by one state led to retaliation by other states. The point was reached where the larger fishery became partitioned at state lines.

This is the untoward situation the Court faced. It could not square the situation with the privileges and immunities clause.

The Court first dealt with fundamental principles.

> The purpose of the clause was to fuse the sovereign states into a nation. Without it, the Court said, citing *Paul* v. *Virginia*, 8 Wall. 168 (1868), nationhood would not have come about. One specific privilege the clause guaranteed was that citizens of state A could do business in state B on substantially equal terms with citizens of that state. *Ward* v. *Maryland*, 12 Wall. 418 (1870). 334 U.S. at 395-396.

The clause bars discrimination against citizens of other states based substantially on the mere fact of noncitizenship. It does not preclude disparity of treatment where there are valid, independent reasons for it. The inquiry is whether such reasons exist, and whether the degree of discrimination bears a close relation to them. 334 U.S. at 396.

The Court then made this inquiry.

The South Carolina statute virtually excluded nonresidents. That it would curb excessive trawling, its putative conservation purpose, seemed doubtful because it did not limit the number of resident boats. But, in any event, to assume that any means can be adopted to attain valid objectives overlooks the purpose of the clause, which is "to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." 334 U.S. at 398.

South Carolina mentioned, but did not try to prove, that the fishing methods and size of boats of nonresidents, and the greater cost of enforcing laws against them, constituted a peculiar evil. The record did not bear this out. Even if it did, the state had other remedies — restricting types of equipment, basing fees on boat size or on the differential in enforcement costs — short of virtual exclusion. There was thus no reasonable relationship between the dangers noncitizens posed and the severe discrimination visited on them. Consequently, the statute was unconstitutional unless commercial shrimp fishing in the maritime belt fell within some unexpressed exception to the privileges and immunities clause. 334 U.S. at 399.

At this point, the Court took up the public interest doctrine as a possible exception.

The Court analyzed the doctrine, and said it frequently had used language supporting that analysis. In only one case, though, the *McCready* case, had it used the doctrine to uphold state action discriminating against commercial hunting or fishing by noncitizens without persuasive independent reasons to justify the discrimination. In that case, the statute prohibited nonresidents from planting oysters in a tidal river. 334 U.S. at 399-401.

The Court then noted two distinctions between the *McCready* case and the *Toomer* case. One was between



stationary oysters and free-swimming migratory fish. The other was between the regulation of fishing in inland waters and in the marginal sea. 334 U.S. at 401.

Based on this, the Court viewed *McCready*, on the one hand, as a single exception to the privileges and immunities clause, and *Toomer*, on the other hand, as a case not falling directly into the exception. The question, therefore, was whether the reasons for the exception called for its extension to a case with these factual distinctions. 334 U.S. at 401.

The Court said the very facts distinguishing *Toomer* made the ownership theory a weak prop for the South Carolina statute.

The free-swimming migratory nature of shrimp made it doubtful if they could be owned, the Court said, quoting *Missouri* v. *Holland*, 252 U.S. 416, 434 (1920): "To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership." Also, only fifteen years after *McCready*, in *Manchester* v. *Massachusetts*, 139 U.S. 240, 265 (1891), the Court had indicated the *McCready* rule might not apply to free-swimming fish.

Similarly, the Court said, the applicability of the ownership doctrine was doubtful because, though the states could regulate within the three-mile belt, they did not own that belt, citing *United States* v. *California*, 332 U.S. 19 (1947). 334 U.S. at 401-402.

The Court in *Toomer* then made this key comment:

> "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.[37] And there is no necessary conflict between that vital policy consideration and the constitutional com-

mand that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States." *Id.* at 402.

The footnote (37) explained that the fiction arose through a confusion between *imperium*, or governmental power to regulate, and *dominium*, or ownership; power over fish and game originated in *imperium*.

The Court refused to expand the *McCready* exception. It held that commercial shrimping in the marginal sea, like other common callings, is within the privileges and immunities clause. For the reasons it had previously given, it struck the statute as unconstitutional.

3. The facts in the *Toomer* case and this case are identical. Both cases involve: free-swimming migratory fish; commercial fishing; attempted state regulation in the marginal sea; statutes excluding nonresidents but not residents; fallacious justifications of the statutes as conservation measures to limit fishing; no showing that nonresidents presented a peculiar evil; the lack of a reasonable relationship between even suppositious evils of nonresidents and the severe discrimination against them.

There is one difference between the cases. South Carolina at least made a stab at reasons to justify the discrimination. Massachusetts does not even try.

The *Toomer* case has been treated as controlling in cases like this one. *Brown* v. *Anderson*, 202 F. Supp. 96, 102-103 (D. Alas. 1962); *Gospodonovich* v. *Clements*, 108 F. Supp. 234, 237 (E.D. La. 1951), *appeal dismissed*, 344 U.S. 911 (1953); *Edwards* v. *Leaver*, 102 F. Supp. 698, 703 (D. R.I. 1952); *Russo* v. *Reed*, 93 F. Supp. 554, 559-560 (D. Me. 1950); *Steed* v. *Dodgen*, 85 F. Supp. 956, 958 (W.D. Tex.



1949); *Dobard* v. *State*, 149 Tex. 332, 342 (1950). Cf. *Mullaney* v. *Anderson*, 342 U.S. 415, 417 (1952); *Schakel* v. *State*, 513 P. 2d 412, 414 (Wyo. 1973). Similar decisions have been made under the equal protection clause. *Takahashi* v. *Fish & Game Comm'n*, 334 U.S. 410, 421 (1948); *Edwards* v. *Leaver*, *supra*.

## II. Massachusetts' Attacks on Toomer v. Witsell are Not Well Taken.

1. Massachusetts attacks *Toomer* as constitutionally invalid or as no longer vital. Both positions are wrong. The Court said as much in *Kleppe* v. *New Mexico*, *supra*, less than a year ago.

That case involved the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331 *et seq.*, enacted to protect those animals on public lands. The New Mexico Livestock Board seized 19 unbranded burros on public lands, and sold them at auction. The Federal Bureau of Land Management demanded the Board recover and return the burros to the public lands. New Mexico attacked the constitutionality of the statute before a three-judge District Court.

The District Court held the statute unconstitutional on the ground that the state had a special public interest in wildlife within its borders based upon that ownership of wildlife. The District Court said that though *Toomer* v. *Witsell* had characterized the ownership doctrine as a legal fiction, the doctrine had never been abrogated. 406 F. Supp. 1237, 1238 (D. N.M. 1975).

This Court held the Act constitutional under the property clause of the Constitution, Art. IV, § 3, cl. 2. The Court handled the special public interest doctrine as follows:

"Appellees' contention that the Act violates traditional state power over wild animals stands on no different footing. Unquestionably the States have broad trustee and police powers over wild animals within their jurisdictions. *Toomer* v. *Witsell*, 334 U.S. 385, 402, 68 S.Ct. 1156, 1165, 92 L.Ed. 1460 (1948); *Lacoste* v. *Dept. of Conservation*, 263 U.S. 545, 549, 44 S.Ct. 186, 187, 68 L.Ed. 437 (1924); *Geer* v. *Connecticut*, 161 U.S. 519, 528, 16 S.Ct. 600, 604, 40 L.Ed. 793 (1896). But as *Geer* v. *Connecticut* cautions, those powers exist only 'in so far as [their] exercise may not be incompatible with, or restrained by, the rights conveyed to the federal government by the constitution.' 161 U.S., at 528, 16 S.Ct., at 604. 'No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of [wildlife], but it does not follow that its authority is exclusive of paramount powers.' *Missouri* v. *Holland*, 252 U.S. 416, 434, 40 S.Ct. 382, 384, 64 L.Ed. 641 (1920). Thus, the Privileges and Immunities Clause, U.S. Const., Art. IV, § 2, cl. 1, precludes a State from imposing prohibitory licensing fees on nonresidents shrimping in its waters, *Toomer* v. *Witsell*, *supra*; the Treaty Clause, U.S. Const., Art. II, § 2, permits Congress to enter into and enforce a treaty to protect migratory birds despite state objections, *Missouri* v. *Holland*, *supra*; and the Property Clause gives Congress the power to thin overpopulated herds of deer on federal lands contrary to state law. *Hunt* v. *United States*, *supra* [278 U.S. 96 (1928)]. We hold today that the Property Clause also gives Congress the power to protect wildlife on the public lands, state law notwithstanding." 96 S.Ct. at 2294-2295.



Two crucial points emerge. The Court based state authority over wild animals upon trustee and police powers, not ownership. It included the privileges and immunities clause, citing *Toomer*, along with the treaty clause, citing *Missouri* v. *Holland*, *supra*, and the property clause, citing *Hunt* v. *United States*, 278 U.S. 96 (1928), as examples of the type of paramount federal power to which state power over game, regardless of the source of that state power, has always been subject.

We think *Kleppe* blunts Massachusetts' attack on the validity and vitality of *Toomer*. But even if *Kleppe* did not exist, the attack fails for several other reasons.

Constitutional rights no longer turn upon whether a governmental benefit is characterized as a right or as a privilege. *Graham* v. *Richardson*, 403 U.S. 365, 374 (1971), which cited *Takahashi* v. *Fish & Game Comm'n*, *supra*, as casting doubt on the distinction as applied to free-swimming fish in the ocean off the California coast. Hence the right-privilege distinction upon which the special public interest doctrine rests no longer exists. See *Sugarman* v. *Dougall*, 413 U.S. 634, 644 (1973).

Also, Massachusetts' position is inherently contradictory. It would be strange indeed if a state could exclude residents from fishing in the marginal sea under a rejuvenated *McCready* but not be able to exclude aliens from doing so under a still vigorous *Takahashi*. There is, of course, no contradiction between *Toomer* and *Takahashi* (which in itself we submit would invalidate the Massachusetts statute).

All of the wild-animal cases Massachusetts cites predate *Toomer*. We can assume the *Toomer* Court considered them. But whether it did or not is really immaterial. The Court understood and rejected the special public interest doctrine. Furthermore, all of the cases except the *McCready* case are irrelevant on the discrimination issue.

Nor is *Toomer* an isolated, sudden, and radical break with the past. In prior cases the Court had pitched the authority of states over wildlife not on state ownership but on the state police power, which is subject to paramount federal power. *Skiriotes* v. *Florida*, 313 U.S. 69, 75 (1941); *Manchester* v. *Massachusetts*, *supra*. Massachusetts may wish *Toomer* were not in the mainstream of the law, but emphatically it is.

Finally, Massachusetts says *Toomer* supports the migratory-stationary distinction with only two authorities, *Missouri* v. *Holland*, *supra*, and *Manchester* v. *Massachusetts*, *supra*, which Massachusetts characterizes as meager. To call such illustrious cases meager smacks of rhetoric, not reason. Besides, there is other authority for this hoary distinction. See *McKee* v. *Gratz*, 260 U.S. 127 (1922).

2. The heart of Massachusetts' case is that the Submerged Lands Act of 1953 undercuts *Toomer*. The Act declared that title to the natural resources, including fish, within the navigable waters of the states vested in the states.

Massachusetts says that the Act affects *Toomer* in two ways. The Act abolishes the tidal-marginal sea distinction *Toomer* drew. Because the Act draws no distinction between free-swimming and stationary fish, somehow it invalidates the distinction which *Toomer* drew with the consequence that free-swimming fish can be susceptible of ownership.

There are several answers to this.

The Submerged Lands Act was the Congressional response to three cases: *United States* v. *Texas*, 339 U.S. 707 (1950); *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *California*, *supra*. These cases held that the federal government and not the states had paramount rights in the marginal sea and control over the resources therein.

Massachusetts says that the Court in *Toomer* relied heavily on *United States* v. *California*, *supra*, and implies that in



effect the Submerged Lands Act overruled that case. This implication is false. The case was not affected by the Submerged Lands Act which exercised rather than repudiated federal power. *United States* v. *Maine*, 420 U.S. 515 (1975).

*Toomer* and the other cases hold that free-swimming fish by their very nature are not susceptible of ownership. If they cannot be owned, the Act could not create such ownership, and the United States did not own them. Thus, by the Act, the United States could not grant to the states what it did not own. The Act only granted what the United States had, its power to regulate and manage these resources. The Supreme Judicial Court said as much in construing the ownership language of the Act as legal shorthand for the power to preserve and regulate free-swimming fish (A. 15).

According to *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313, 318 (1973), "The Act merely confirmed the States' pre-existing rights . . . by, in effect, quitclaiming all federal claims thereto." Since, as just seen, free-swimming fish cannot be owned, the states never had a preexisting right of ownership in the fish that the Act could confirm.

Nor did Congress intend the Act to overrule *Toomer*. 99 Cong. Rec. 2563-2564 (1953), printed in the Addendum (pp. 21-28). Indeed, since Congress recognized *Toomer's* authority, Congress intended the *Toomer* "legal fiction" analysis to control the ownership language of the Act in its application to free-swimming fish.

The courts have not read the Act to resurrect the ownership theory. Rather, they talk in terms of the modern theory of police power. *Corsa* v. *Tawes*, 149 F. Supp. 771 (D. Md. 1957), *aff'd*, 355 U.S. 37 (1957); *Organized Village of Kake* v. *Egan*, 174 F. Supp. 500 (D. Alas. 1959), *aff'd*, 362 P. 2d 901 (Sup. Ct. Alas. 1961), *aff'd*, 369 U.S. 60 (1962); *Glenovich* v. *Noerenberg*, 346 F. Supp. 1286 (D. Alas. 1972), *aff'd*, 409 U.S. 1070 (1972).

### III. To Adopt Massachusetts' Position would Burden the Nation with Problems Heretofore Solved.

The Court fashioned *Toomer* v. *Witsell* to correct a feudal situation in the coastal sea. Massachusetts asks the Court to reinstate the legal basis for that situation at the expense of our nationhood. This would be a sordid boon.

Boats must follow fish, and fish know no boundaries. In following a school, or in dragging, a fisherman would have to turn away at the imaginary boundary. Prudently, he would turn away some distance from it lest he inadvertently sail over it. The damaging effect on commercial fishing is obvious.

Commercial fishermen who live in states like New Hampshire, with short shorelines, would be hard put indeed. The territorial waters of such states perforce are small. The effect of Massachusetts' position would be to concentrate commercial fishing in certain states.

Tc overrule *Toomer* and, like Lazarus, resurrect *McCready* would signal the return of the privilege-right distinction. This would mightily disturb other areas of the law. See, *Takahashi* v. *Fish & Game Comm'n, supra,* and *Graham* v. *Richardson, supra.* In the wildlife and natural resources area, it would undercut the utility of the police power as a management tool.

The police power is a more flexible management tool than the special public interest doctrine. It does not come burdened with the metaphysical concepts of old land law. It harmonizes better with other constitutional provisions. And it allows a state to accomplish as much as any state in our nation legitimately needs to accomplish with respect to its natural resources.

At bottom, Massachusetts misconceives the issue. The ownership theory was never an end but only a means. It arose to justify the states' control of and need to control wildlife. Now the police power better furnishes that justification.



Whatever be the basis for the control, and this is the central point, the control must be exercised consistent with the guarantees of the Constitution. This is the teaching of *Toomer.*

In policy as well as in law, Massachusetts' position is wrong.

### Conclusion.

The decision below should be affirmed.

Respectfully submitted,

GEORGE M. VETTER, JR.,
HINCKLEY, ALLEN, SALISBURY
& PARSONS,
2200 Industrial Bank Building,
Providence, Rhode Island 02903.
(401) 274-2000

Of Counsel:
NANCY HALL McMILLEN,
HINCKLEY, ALLEN, SALISBURY & PARSONS,
2200 Industrial Bank Building,
Providence, Rhode Island 02903.

Dated: December 22, 1976.

*Attorneys for Respondent.*

**Addendum.**

99 CONG. REC., PP. 2563-2564 (1953).

MR. COLMER. Mr. Chairman, I offer an amendment.

The Clerk read as follows.

Amendment offered by MR. COLMER: On page 6, line 4, after the words "natural resources", insert the following: "subject to the condition that there shall be no unreasonable disparity between the treatment by a State or its grantees of its citizens and the treatment by such State or its grantees of the citizens of another State in the management, administration, leasing, controlling, developing, and use of the said national resources."

MR. COLMER. Mr. Chairman, on yesterday I addressed the House briefly on this subject, giving advance notice that I proposed to offer this amendment. In the brief time that I have, of course, I cannot go too much into the reasons and the need for this amendment. But the amendment is aimed at one thing and one thing alone. That is to reassert in this legislation what is already considered to be the law with reference to the use and taking of fish, shrimp, and other migratory marine life. Under section 2 of article 4 of the Constitution, there can be no disparagement in the way of treatment among citizens of one State against citizens of another State. We have had in this country, and particularly in my section, a great deal of confusion and chaos, particularly with reference to shrimp boats going from the waters of one State to the waters of another State. Sometimes attempts have been made to pass unreasonable laws requiring exorbitant licenses of the citizens of one State who may want to go into the waters of another State.

MR. WILLIS. Mr. Chairman, will the gentleman yield?

MR. COLMER. I yield.

MR. WILLIS. The gentleman is familiar with the Supreme Court decision involved in the Carolina situation with reference to shrimping. I understand his amendment goes no further than to simply spell out in this bill what the gentleman thinks the Supreme Court held in the matter of licenses and so on for shrimping and for the fishing industry as against one State vis-a-vis another State.

MR. COLMER. I thank my friend for his contribution. Our States adjoin and he knows of the problem there. My amendment merely spells out what the Constitution provides and what the Supreme Court in the South Carolina case, to which my friend referred, announced to be the law. The purpose of this — if you ask why we should have this amendment written into this bill — is to dispell any idea that this tidelands law under the broad terms of this bill with reference to resources would give one State the right to discriminate against the citizens of another State. I hope my friends, the chairman of the committee and of the subcommittee, will see fit to accept this amendment.

MR. CELLER. Mr. Chairman, will the gentleman yield?

MR. COLMER. I yield.

MR. CELLER. Does the State of Louisiana allow citizens of Mississippi to fish in Louisiana waters and vice versa. What is the need of the amendment then, if that is so?

MR. COLMER. I do not want to get into any argument here because there has been extreme controversy between the two States. Not only between those two States but between other States as well. For instance North Carolina and South Carolina and also between Texas and Louisiana and other States which I might mention. Two cases have gone to the Supreme Court. We want to spell out here that this does not grant any additional authority, or attempt to grant any additional au-



thority. That is the purpose of this amendment. I cannot see why there should be any objection to it.

As I pointed out yesterday, migratory fish recognize no artificial boundaries. They travel in the open waters, and as I illustrated in my talk yesterday, there was a gigantic school of shrimp miles square, which was discovered off the coast of Florida about a year and a half ago. That school of shrimp was converged upon by boats from Virginia on the east and Texas on the west. These fishermen from the different States followed the shrimp as they slowly migrated across the waters of Florida, Alabama, Mississippi, Louisiana, and Texas and into the waters of Mexico.

THE CHAIRMAN. The time of the gentleman has expired.

MR. GRAHAM. Mr. Chairman, I rise in opposition to the amendment.

In the first place, Mr. Chairman, the words are entirely superfluous in view of the decision of the Supreme Court. In *Toomer* v. *Witsell* (334 U.S. 385, 393 (1947)), Mr. Justice Vinson, in the majority opinion, said:

In the court below *United States* v. *California* (332 U.S. 19 (1947)) was relied upon for this proposition. Here appellants seem to concede, and correctly so, that such is neither the holding nor the implication of that case; for in deciding that the United States, where it asserted its claim, had paramount rights in the 3-mile belt, the court pointedly quoted and supplied emphasis to a statement in *Skiriotes* v. *Florida*, (313 U.S 69, 75 (1941)).

Our position is that this matter is settled. This is a proposition which could not lead to discrimination on the part of one State against the others and thus open the door to endless litigation. We are opposed to it and ask that the amendment be defeated.

MR. COLMER. Mr. Chairman, will the gentleman yield?

MR. GRAHAM. I yield.

MR. COLMER. I did not get the citation of the case the gentleman read. Was that the South Carolina case?

MR. GRAHAM. That is the South Carolina case, the shrimp-boat case.

MR. COLMER. As I understand the gentleman — and I did not get everything he said —

MR. GRAHAM. I said it was the shrimp-boat case.

MR. COLMER. Of course the main thing I caught were the very unpleasant words that the gentleman rose in opposition, but I did not get the citation.

MR. GRAHAM. I said when the shrimp boats come in in South Carolina.

MR. COLMER. Now, if I understand the gentleman correctly, he takes the position that the provisions of my amendment are already in the law.

MR. GRAHAM. That is right; that is correct.

MR. COLMER. And there is no necessity for this. Then I asked the gentleman what objection there may be to a restatement of it here.

MR. GRAHAM. Just the same as we would not restate the Constitution; that is the law.

MR. COLMER. But the gentleman must realize that it would have a very powerful and deterrent effect upon these intrastate squabbles that have arisen in the past. I regret that the gentleman sees it necessary to oppose this amendment.

MR. GRAHAM. May I say to the gentleman from Mississippi [MR. COLMER] that our position is that the Constitution, of course, is superior to any law of any State, and that has already been decided, and the Supreme Court held as I have indicated. We think it is redundancy, unnecessary, and could serve no good purpose.

MR. MCCARTHY. Mr. Chairman, will the gentleman yield?

MR. GRAHAM. I yield.



MR. MCCARTHY. I think it important that we give attention to this amendment, because it does, I think, draw a line which may save us some trouble in the future. Right now Minnesota is having trouble with South Dakota with regard to migratory birds. The South Dakotans refuse to let us hunt in South Dakota, and we do not know whether the Supreme Court will sustain us or not, but a provision such as this would have saved us the trouble that our duck hunters are experiencing.

MR. GRAHAM. But that is a matter of intrastate and interstate concern and does not apply to foreign waters.

MR. MCCARTHY. These will be interstate waters once the boundaries have been redefined.

MR. GRAHAM. Not altogether, no; there will be the broad ocean also.

THE CHAIRMAN. The question is on the amendment offered by the gentleman from Mississippi [MR. COLMER].

The question was taken; and on a division (demanded by MR. COLMER) there were — ayes 32, noes, 77.

So the amendment was rejected.

MR. COLMER. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by MR. COLMER: On page 6, line 4, after the words "State resources", insert "subject to the condition that there shall be no unreasonable disparity between the treatment by a State or its grantees of its citizens and the treatment by such State and its grantees of the citizens of another State in the management, administration, controlling, use, licensing, and taking of fish, shrimp, and other migratory marine animal life."

MR. GRAHAM. Mr. Chairman, I make the point of order that the amendment is not in order because it is merely the same amendment offered at another place.

MR. COLMER. Mr. Chairman, may I be heard on the point of order?

THE CHAIRMAN. The Chair will hear the gentleman briefly.

MR. COLMER. Mr. Chairman, we disagree with the learned gentleman from Pennsylvania. The first amendment offered went to the whole question of resources affected; oil, minerals, and other matters. This merely goes to fish, shrimp, and other migratory marine life. I hope that the distinguished chairman of the committee will accept this amendment.

THE CHAIRMAN. The Chair believes that the amendment is different in wording; therefore overrules the point of order.

MR. COLMER. Mr. Chairman, of course, I realize what we are up against here today. I am not going to term it steamrollering as has been charged here today, but it is no different from any other proceedings that we have had here in the past. This is just another case of a legislative committee taking the position that the bill is sacred and there must not be any i's dotted or t's crossed.

This amendment is the same proposition that I argued here a moment ago but, as I pointed out in response to the Chair and in response to the objection of the learned gentleman from Pennsylvania, it only affects marine life, while my first amendment covered all resources. That is the point we are concerned about, that is the point that we wish to have restated if it must be restated so that we can stop so far as possible these interstate squabbles. We like to live in peace with our neighbors, we do not want to be squabbling with them and all we are asking here is, according to my ordinarily genial friend from Pennsylvania's contention, for a restatement that that be the law.

I hope that some of that milk of human kindness that pervades him ordinarily when he sits on the aisle will assert itself in his position of authority here and in his desire for protecting the sacredness of the committee bill as it is brought out. I hope the gentleman will accept the amendment; otherwise I realize fully that there is little hope of its adoption in view of what just happened on my first amendment.



But, Mr. Chairman, if this effort does prove to be futile as we have indicated we now suspect so far as the adoption of the amendment is concerned, it is nevertheless conforting to know that it has at least served the purpose of having made the record. And while the amendment may not prevail as part of the law, the debate will indicate conclusively that it is the opinion of the chairman of the Judiciary Committee of the House and the chairman of the subcommittee of the Judiciary Committee of the House as well as the opinion of the House that the substance of the amendment is presently the law of the land. And furthermore that the refusal of the amendment is based entirely and exclusively upon the opinion of the Judiciary Committee and of the House that the provisions of the amendment are now the law of the land and therefore that there is no necessity for a restatement of it in the bill.

MR. GRAHAM. Mr. Chairman, I rise in opposition to the pending amendment. I thank the gentleman from Mississippi for his fine compliment.

Mr. Chairman, it has always been my understanding that anything of a migratory nature, like migratory birds and such, must be settled by treaty or compact. This whole matter can be settled as between the States of Mississippi and Louisiana or between the States south thereof by a compact.

The argument we advanced in the other case applies here. This is limited to fish, but it is no different in our dealing with it than the other. We object to the amendment and we ask for its defeat.

MR. COLMER. Mr. Chairman, will the gentleman yield?

MR. GRAHAM. I yield to the gentleman from Mississippi.

MR. COLMER. The gentleman spoke of compacts. We entered into a compact down in these Southern States on the Gulf of Mexico here a couple of years ago and on the floor of this House I offered an amendment of similar import that would maintain the status quo, which was adopted and passed

unanimously by the House. That is what we are asking you to do here now — to have a restatement of that and a protection of our rights and to stop this squabbling.

THE CHAIRMAN. The question is on the amendment offered by the gentleman from Mississippi [MR. COLMER].

The question was taken; and the Chair being in doubt, the Committee divided and there were — ayes 25, noes 61.

So the amendment was rejected.

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